

1993

Robert A. Knibbe v. Phil Himmelberger : Brief of Appellee

Utah Court of Appeals

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Jan Graham; Utah Attorney General; Thom D. Roberts; Assistant Attorney General; Attorneys for Respondent-Appellant.

Robert M. McRae; McRae & DeLand; Attorney for Petitioner-Appellee.

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930041-CA

IN THE UTAH COURT OF APPEALS

ROBERT A. KNIBBE,	:	
Petitioner/Appellee,	:	BRIEF OF APPELLEE
vs.	:	
PHIL HIMMELBERGER, Bureau	:	Case No. 930041-CA
Chief, Drivers License	:	
Services, State of Utah,	:	Category No. 14/15
Department of Public Safety,	:	
Respondent/Appellant.	:	

APPEAL FROM THE FINAL JUDGMENT OF THE EIGHTH
JUDICIAL DISTRICT, UINTAH COUNTY, STATE OF UTAH,
THE HONORABLE JOHN A. ANDERSON, PRESIDING

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Attorneys for Respondent-
Appellant

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Appellant

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- 1: Order for Extraordinary Relief
- 2: State of Utah Department of Public Safety Breathtesting Regulations
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IN THE UTAH COURT OF APPEALS

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vs.	:	
PHIL HIMMELBERGER, Bureau	:	Case No. 930041-CA
Chief, Drivers License	:	
Services, State of Utah,	:	Category No. 14/15
Department of Public Safety,	:	
Respondent/Appellant.	:	

ISSUES PRESENTED AND STANDARDS OF REVIEW

Petitioner accepts the Issues Presented and Standards of Review as set forth in Respondent's Brief.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Attached in the Addendum are the following determinative statutes and rules: Utah Code Ann. §41-2-131; §§63-46b-14, 15, and 18; §78-3-4; §41-6-44.3; and Rule 65B, Utah Rules of Civil Procedure.

STATEMENT OF THE CASE

Petitioner accepts the Statement of the Case as set forth by Respondent, but wishes to direct the Court's attention to the order on the Petition for Extraordinary Relief (Addendum 1) in which a hearing was scheduled for October 21, 1992 at 10 a.m. at which time Respondent failed to appear.

SUMMARY OF ARGUMENT

Petitioner claims that under the status of review for Driver's License per se hearings that the Code of Judicial Administration, §63-46b-15 is not the exclusive remedy for review purposes based upon the practicalities of the legislative review procedures as currently exists.

ARGUMENT

U.C.A. §63-46b-15 ET. SEQ. DOES NOT AFFORD AN ADEQUATE JUDICIAL REVIEW REMEDY IN VIEW OF THE TIME FRAME SET FORTH FOR HEARING AND JUDICIAL REVIEW.

It is fundamental that a drivers license is a proprietary interest which can only be suspended or terminated by due process of law. United States Constitution Fifth Amendment and Fourteenth Amendment, Utah Constitution Article 1, Section 7, Kehl v. Schwendiman, 735 P.2d 413, (Utah 1987). Under the Administrative Procedures Act, cited above, as a practical matter petitioner and persons similarly situated can easily be deprived of their driving privileges based upon informal administrative procedures without the availability of a timely review of those informal decisions.

U.C.A. §41-2-130(5)(d) and (7)(a) permits a designated hearing officer to conduct a hearing to determine if a driver was operating a motor vehicle while under the influence of alcohol and/or drugs. (R. 17-18)

Pursuant to Murray v. Hall, 663 P.2d 1314 (Utah, 1983) at 1320, this Court permitted affidavits of compliance with Utah Code

Ann. §41-6-44.3 to be submitted at informal hearings without the necessity of the intoxilyzer maintenance officer appearing in person without the formalities of a subpoena. Implicit in the Department of Public Safety Breath Testing Regulations on file in the Archives (Addendum 2) which assumes arguendo that the Commissioner of Public Safety has the authority to create evidentiary rules that the subject breath testing machine must be tested in intervals not to exceed 40 days. This is the foundation to establish to the court or administrative hearing officer for making findings that the machine was operating correctly at the time of the subject test.

For the foregoing statements of petitioner's position the Court's attention is directed to the following practicalities:

a) Upon an informal determination that the Petitioner was in violation of Utah Code Ann. §41-6-44 and as amended, Petitioner's driving privileges can be revoked for a period of 90 days beginning on the 30th day after arrest. (Utah Code Ann. §41-2-130(7)(a))

b) Filing a petition for de novo review pursuant to §63-46b-15 et seq. grants to respondent 20 days in which to answer to the petition. (Rule 12(a), U.R.C.P.) Any discovery which obviously includes the informal hearing record must be responded to within 30 days after service. (U.R.C.P. 6(e), 3 days for mailing; U.R.C.P. 33(a), 30 days to answer interrogatories; and U.R.C.P. 34(b), 30

days to respond to request for production of documents.

c) A request for trial setting pursuant to Rule 4-104(2) of the Code of Judicial Administration, permits a ". . . trial date may be obtained at any time and shall be set as soon as possible subject to the scheduling limitations of the calendar."

d) The foregoing is subject to the Sixth Amendment of the Constitution of the United States (criminal defendants right to speedy trial) and Rule 17, Utah Rules of Criminal Procedure (priority of criminal trials).

As a practical matter, hearing of the above the petition for de novo review becomes moot before a review may be held and therefore will not be considered by an appellate court. Burkett v. Schwendiman, 773 P.2d 42 (Utah 1989) at 44. Respondent relies upon Brinkerhoff v. Schwendiman, 790 P.2d 587 (Utah 1990), and in doing so overlooks the following at page 590: "In summary, the trial de novo cured any technical procedural errors occurring at the informal DLS hearing."

The procedural errors complained of were adequately preserved. (TR. 31-34, Addendum 3) To argue that the provisions of Utah Code Ann. §63-46b-18(4)(a) "the agency violated its own rules in denying the stay," (which there is no evidence that any such rules exist) is a violation of the exclusive rule making power of the Supreme Court of Utah. (Code of Judicial Administration, Rule 11-101)

An attempt by the legislature to abrogate those powers by eliminating a remedy permitted by U.R.C.P. Rule 65B(a), which affords a temporary reinstatement order, "where no other plain, speedy or adequate remedy is established," should be faulted. An equal status for judicial review, assuming arguendo that the Supreme Court has relinquished its rule making power to the legislature in enacting the Administrator's Procedures Act, should permit petitioner to proceed as permitted by the Rules of Civil Procedure.

CONCLUSION

Petitioner submits that Appellant is appealing a default proceeding without any record of obtaining any relief pursuant to Rule 60b, U.R.C.P., and second, that Appellant's motion to dismiss is unfounded as a matter of law.

DATED this 13 day of May, 1993.

McRAE & DeLAND

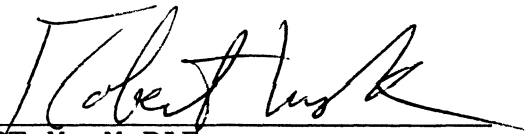


ROBERT M. McRAE
Attorney for Petitioner/Appellee

CERTIFICATE OF MAILING

I do hereby certify that I mailed two true and correct copies of the foregoing BRIEF OF APPELLEE this 13 day of May, 1993, to the following:

Thom D. Roberts
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114


ROBERT M. McRAE

ADDENDUM 1

Addendum 1
FILED
DISTRICT
UINTAH COUNTY
SEP 08 1992
BY SHANA WITBECK, CLERK
DEPUTY

ROBERT M. McRAE, #2217
McRAE & DeLAND
Attorney for Defendant
209 East 100 North
Vernal, UT 84078
(801) 789-1666

IN THE EIGHTH JUDICIAL DISTRICT COURT OF UINTAH COUNTY
STATE OF UTAH

ROBERT A. KNIBBE, :
Petitioner, : ORDER FOR EXTRAORDINARY
RELIEF
: Rule 65B, U.R.C.P.
vs. : Case No.
PHIL HIMMELBERGER, :
Bureau Chief, Drivers :
License Services, State : Judge
of Utah, Department of :
Public Safety, :
Respondent. :

Upon reading the Petition of Robert A. Knibbe,
supported by the Affidavit of Robert M. McRae, IT IS ORDERED
AS FOLLOWS:

1. Respondent is ordered to forthwith reinstate
Petitioner's driving privileges pending hearing in this case.

2. Respondent is ordered to forthwith deliver to
this Court a transcript of the hearing regarding Petitioner's
driving privileges, the same having taken place August 26,
1992, together with the original of the tape recording of said
hearing.

3. Respondent is ordered to appear before this Court on October 21, 1992 at 10:00 a.m., then and there to answer to the allegations of Petitioner and then and there to show cause why Respondent should not be ordered to reinstate Petitioner's driving privileges because of the acts complained of by Petitioner in the administration and conduct of Petitioner's driver's license per se hearing.

4. It is further Ordered that service by certified mail on Phil Himmelberger, Division Chief and Thomas Roberts, Assistant Attorney General, assigned to Respondent's Department shall suffice as service of process.

DATED this 3 day of September, 1992.

BY THE COURT:

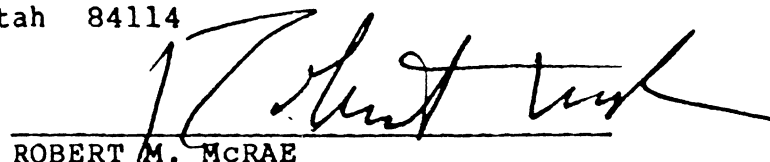

District Court Judge

CERTIFICATE OF MAILING

I do hereby certify that I mailed, postage prepaid, a true and correct copy of the foregoing to the following on this 3 day of September, 1992:

Phil Himmelberger
Respondent
Drivers License Services
4501 South 2700 West
Salt Lake City, Utah 84119

Tom Roberts
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114


ROBERT M. McRAE

Is your RETURN ADDRESS completed on the reverse side?

SENDER:

- Complete items 1 and/or 2 for additional services.
- Complete items 3, and 4a & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):

1. ☐ Addressee's Address
2. ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:

Tom Roberts
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

4a. Article Number

P 371 203 668

4b. Service Type

- ☐ Registered ☐ Insured
☒ Certified ☐ COD
☐ Express Mail ☐ Return Receipt for Merchandise

7. Date of Delivery

SEP 10 1992

5. Signature (Addressee)

6. Signature (Agent)

8. Addressee's Address (Only if requested and fee is paid)

PS Form 3811, December 1991 ☆ U.S.G.P.O. : 1992-307-530

DOMESTIC RETURN RECEIPT

Thank you for using Return Receipt Service.

Is your RETURN ADDRESS completed on the reverse side?

SENDER:

- Complete items 1 and/or 2 for additional services.
- Complete items 3, and 4a & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):

1. ☐ Addressee's Address
2. ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:

Mr. Phil Himmelberger
Drivers License Service
4501 South 2700 West
Salt Lake City, Utah 84119

4a. Article Number

P 371 203 667

4b. Service Type

- ☐ Registered ☐ Insured
☒ Certified ☐ COD
☐ Express Mail ☐ Return Receipt for Merchandise

7. Date of Delivery

9-9-92

5. Signature (Addressee)

McKen Middleman

6. Signature (Agent)

8. Addressee's Address (Only if requested and fee is paid)

PS Form 3811, December 1991 ☆ U.S.G.P.O. : 1992-307-530

DOMESTIC RETURN RECEIPT

Thank you for using Return Receipt Service.

ADDENDUM 2



STATE OF UTAH

DEPARTMENT OF PUBLIC SAFETY

BREATHTESTING REGULATIONS

Effective: 6/11/79
Archives file #3531

Revised: 4/1/81
Archives file #4714

Revised 11/4/83
Archives file #6734

Revised: 10/15/84
Archives file #7446

Revised: 7/1/86
Archives file #8387

Revised: 9/10/87
Archives file #8911

Revised: 1/4/88
Archives file #9090

Revised: 1/3/89
Archives file #9732

Revised: 7/5/89
Archives file #9992

Revised: 11/15/90
Archives file #011126

R735-500 RULE FOR CHEMICAL ANALYSIS STANDARDS AND TRAINING

R735-500-1 Short title

A. The short title of this rule shall be "Rule for Chemical Analysis Standards and Training."

735-500-2 Department activity

A. The Commissioner of the Department of Public Safety and his representatives, hereinafter "Department" are authorized by Section 41-6-44.3 UCA to establish standards for the administration and interpretation of chemical analysis of a person's breath, including standards of training.

R735-500-3 Purpose of rule

A. It is the purpose of this rule to set forth:

- (1) Procedures whereby the Department may certify:
 - (a) Breath alcohol testing instruments;
 - (b) Breath alcohol testing programs;
 - (c) Breath alcohol testing operators;
 - (d) Breath alcohol testing technicians; and
 - (e) Breath alcohol testing program supervisors.
- (2) Adjudicative procedure concerning:
 - (a) Application for and denial, suspension or revocation of the aforementioned certifications;
 - (b) Appeal of initial department action concerning the aforementioned certifications; and
 - (c) Declaratory orders.

R735-500-4 Application for certification

A. Application for any certification herein shall be made on forms provided by the Department in accordance with Section 63-46b-3 UCA.

R735-500-5 Instrument certification

A. All breath alcohol testing instruments hereinafter "instrument", to be used for evidentiary purposes must be certified by brand and/or model by the Department.

(1) The Department will establish and maintain a list of certified instruments by brand and/or model for use in the state. The list is incorporated into R735-500 by this reference.

(2) If application is made for certification of an instrument by brand and/or model not on the approved list, the Department shall examine and evaluate the instrument to determine if it meets the criteria for certification.

B. In order to be certified each brand and/or model of breath testing instrument must meet the following criteria.

(1) Breath alcohol analysis shall be accomplished through the principle of infra-red energy absorption, or any other accepted scientific principle.

(2) Breath specimen collected for analysis shall be essentially alveolar and/or end expiratory in composition according to the analysis method utilized.

(3) The instrument shall analyze a reference sample, such as headspace gas from a mixture of water and a known weight or volume of ethanol held at a constant temperature, the result of which must agree with the reference sample predicted value within +/- .005 or 5% whichever is greater or such limits as set by the Department.

(4) The specificity of the procedure shall be adequate and appropriate for the reasonable analysis of breath specimen for the determination of alcohol concentration in law enforcement. The instrument functions to be checked shall include, but not necessarily be limited to the following:

1. Intoxilyzer 4011 series.

- (a) electrical power.
- (b) operating temperature.
- (c) internal purge.
- (d) zero set.
- (e) printer deactivation.
- (f) fixed absorption calibration (if so equipped).
- (g) known reference samples.
- (h) reads in grams of alcohol per 210 liters of breath.

2. Intoxilyzer 5000 series.

- (a) electrical power.
- (b) operating temperature.
- (c) internal purge.
- (d) internal calibration.
- (e) diagnostic
- (f) invalid test
- (g) known reference samples.
- (h) reads in grams of alcohol per 210 liters of breath.

(5) Any other tests deemed necessary by the Department to correctly and adequately evaluate the instrument, to give reasonably correct results in routine breath alcohol testing and be practical and reliable for law enforcement purposes.

C. Upon proof of compliance with Paragraph B of this section an instrument may be certified by brand and/or model and placed on the list of certified instruments.

(1) Inclusion on the Department's list of certified instruments will verify that the instrument by brand and/or model meets the criteria listed in Paragraph B of this section.

(2) The Department may suspend or revoke the certification of a brand and/or model of instrument and remove it from the list of certified instruments for cause.

D. The Breath Alcohol Testing Program Supervisor shall determine if the individual instrument by serial number is the same brand and/or model that is shown on states in Paragraph B of this section.

E. After certification if it is determined by the Department that a specific instrument is unreliable and/or unserviceable, it will be removed from service and, certification may be withdrawn.

F. It is the intent of this rule that only certified breath alcohol testing technicians when required, shall provide expert testimony concerning the certification and all other aspects of the breath alcohol testing instruments under his/her supervision.

R735-500-6 Program certification

A. All breath alcohol testing techniques, methods, and programs hereinafter "program" must be certified by the Department.

B. Prior to initiating a program, an agency or laboratory shall submit an application to the Department for certification. The application shall show the brand and/or model of the instrument to be used and contain a resume' of the Program to be followed. An on-site inspection shall be made by the Department to determine compliance with all applicable provisions in this rule.

B. All training for initial and renewal certification will be conducted by certified Breath Alcohol Testing Program Supervisor and/or certified Breath Alcohol Testing Technician.

C. Initial Certification

(1) In order to apply for certification as an operator of a breath alcohol testing instrument, an applicant must successfully complete a course of instruction approved by the Department, which must include as a minimum the following:

- a. One hour of instruction on alcohol and traffic safety.
- b. Three hours of instruction on the effects of alcohol in the human body.
- c. Three hours of instruction on the operational principles of breath testing.
- d. Two hours of instruction on the Uniform Alcohol Influence Report Form.
- e. Two hours of instruction on testifying in court.
- f. Four hours of instruction on the legal aspects of chemical testing, driving under the influence, case law and other alcohol related laws.
- g. Four hours of instruction on detection of the drinking driver.
- h. Four hours of laboratory participation (performing simulated tests on the instruments and testing actual subjects.)
- i. One hour for examination and critique of course.

(2) After successful completion of the initial certification course a certificate will be issued with an expiration date affixed.

D. Renewal Certification

(1) The Operator is required to renew certification prior to its expiration date. The minimum requirement for renewal of operator certification will be:

- a. Two hours of instruction on the effects of alcohol in the human body.
- b. Two hours of instruction on the operational principles of breath testing.
- c. One hour of instruction on the Alcohol Influence Report Form and testimony of arresting officer.
- d. Two hours of instruction on the legal aspects of chemical testing and detecting the drinking driver.
- e. One hour for examination and critique of course.

(2) Any operator who allows his/her certification to expire one year or longer must retake and successfully complete the initial certification course as outlined in R735-500-7, Paragraph C.

R735-500-8 Technician certification

A. All breath alcohol testing technicians hereinafter "technicians", must be certified by the Department.

B. The minimum qualification for certification as a technician are:

(1) Satisfactory completion of the operator's initial certification course and/or renewal certification course.

(2) Satisfactory completion of the Breath Alcohol testing Supervisor's course offered by Indiana University, or an equivalent course of instruction, as approved by the Breath Alcohol Testing Program Supervisor.

(3) Satisfactory completion of a breath alcohol testing instruments manufacturer's maintenance/repair technicians course for the instruments in use in the State of Utah or is qualified by nature of his/her employment or training to maintain and/or repair the instruments in use in the State of Utah.

(4) Maintain technician's status through a minimum of eight (8) hours training each calendar year. This training must be directly related to the breath alcohol testing program, and must be approved by the Breath Testing Program Supervisor.

(5) Any technician who fails to meet the requirements of R735-500-8 Paragraph B, Sub Paragraph (4) must renew his/her certification by meeting the minimum requirements as outlined in R735-500-8, Paragraph B Sub-paragraph (1), (2) and (3).

R735-500-9 Supervisor certification

A. The Breath Alcohol Testing Program Supervisor hereinafter "supervisor", will be required to meet the minimum certification standards set forth in Section R735-500-8. Certification should be within one (1) year after initial appointment or other time as stated by the Department.

R735-500-10 Previously certified personnel

A. This rule shall not be construed as invalidating the certification of personnel previously certified as operators under programs existing prior to the promulgation of this rule. Such personnel shall be deemed certified, provided they meet the training requirements as outlined in R735-500-7 Paragraph D.

B. This rule shall not be construed as invalidating the certification of personnel previously certified as technician under programs existing prior to the promulgation of this revised rule. Such personnel shall be deemed certified, providing they meet the training requirements as outlined in R735-500-8 Paragraph B Sub-paragraph (4).

R735-500-11 Revocation or suspension of certification

A. The Department may, on the recommendation of a Supervisor, revoke or suspend the certification of any operator or technician:

- (1) Who fails to comply with or meet any of the criteria required in this rule.
- (2) Who has falsely or deceitfully obtained certification.
- (3) For other good cause.

R735-500-12 Adjudicative proceedings

A. Purpose of section. It is the purpose of this section to set forth adjudicative proceedings in compliance with chapter 63-46b UCA.

B. Designation. All adjudicative proceedings performed by the department shall proceed informally as set forth herein and as authorized by sections 63-46b-4 and 63-46b-5 UCA.

C. Denial, suspension or revocation. A party who is denied certification or whose certification is suspended or revoked, will be told by the department the reasons for denial, suspension, or revocation.

D. Appeal of denial, suspension, or revocation. A party who is denied certification or whose certification is suspended or revoked may appeal to an individual designated by the department on a form provided by the department in accordance with section 63-46b-3 UCA. The appeal must be filed within ten days after receiving notice of the department action.

E. No hearing will be granted to the party. The individual selected by the department will merely review the appeal and issue a written decision to the party within ten days after receiving the appeal.

Key: traffic regulations
9/1990

41-6-44
63-46b

ADDENDUM 3

Johnson was doing it and has retired and I'm not aware of who took over the job.

Att.: Well, do you know if a Ronald Oldsworth is a trooper on the Highway Patrol?

Officer: No, I don't.

H.O.: Just for the record. That's Ronald B. Ellsworth.

Att.: I have nothing further of this witness.

H.O.: Do you wish to have your driver make any statements?

Att.: No. Do you have an affidavit that says Ronald B. Ellsworth is certified breath technician?

H.O.: No, but on the other hand I don't have one that Phil Johnson is either and we've been accepting his. And I've also been accepting Ronald B. Ellsworth's from Manila, Daggett County machine for well over two years.

Att.: And you have an affidavit after the 19th of July.

H.O.: I do not.

Att.: And you have no affidavit from any official custodian appointed by Bardello, or however you pronounce his name, that anybody has these documents in the Department of Public Safety as being

H.O.: No. I'll just refer you to the requirement of the code.

Att.: Under Murray vs. Johnson?

H.O.: Under 41-6-44.3 that states that these particular intoxilyzer machines have to be checked and

certified accurate no less often than every 40 days.

Att.: If you are going to use them as evidence in a court of record.

H.O.: That's correct.

Att.: Under Murray vs. Johnson, you have to have an affidavit from somebody's who's the official custodian of records that these people are certified technicians and in fact these affidavits were given during the course of 40 days.

H.O.: Counsel is correct. There has to be some foundation which would be available on request to anyone wanting to know whether or not Mr. Ellsworth or Mr. Johnson are certified breath test technicians. That record exists at the Highway Patrol Office right there by the freeway below 53rd South in Salt Lake City and is on file if you wish to check it. I'm accepting these affidavits at face value since they come to me from that source on a regular basis, being sent out to each of the Hearing Officers throughout the State of Utah as regular business practice and under the acceptance of rules of evidence that's acceptable for our purposes here.

Att.: Where is one after the 19th of July?

H.O.: I didn't say I had one after the 19th of July.

Att.: You're the one that takes - Niels, you're the one that makes your record right at the beginning of this hearing that says we will take notice of the following documents.

H.O.: That's right. June the 9th and July the 15th. I never said I had one after the 19th of July.

Att.: Why do we care for the one on June the 9th?

H.O.: This establishes simply that the prior check was within 40 days.

Att.: What about the subsequent check?

H.O.: Subsequent, the subsequent

Att.: If there was one.

H.O.: The subsequent check is not really at issue here since here since only three days, four days had elapsed from the time the machine was checked to the time the subject test.

Att.: So?

H.O.: If it had been more than 40 days later then I would want to see the affidavit.

Att.: And so, what if it's taken the day before the subject test?

H.O.: I would think that the time that that machine sits there unchecked as that time became greater the possibility of the machine being not reliable would also be greater proportionately.

Att.: Greater from what point? We're talking about greater per day up to the 40 days?

H.O.: No. I'm just saying that events and circumstances accruing over a 40 day period of time or such has greater risk of not being reliable than events and circumstances over a 4 day period of time.

Att.: That's never slowed you down before. Relying on some antiquated decision

H.O.: Well

Att.: of David Sam who's no longer around.

H.O.: I believe that there's a presumption of reliability on the machine during that 40 day period subsequent to the prior check. That's the way I've ruled them all as you're quite aware. I haven't changed my opinion of that.

Att.: Yet.

H.O.: 40 days has not yet elapsed.

Att.: It's not my fault.

H.O.: No, it's not mine either.

Att.: So, you think there's an evidentiary presumption that if it's done, if the test is administered within 40 days prior to or subsequent to the last check there is an evidentiary presumption that the machine

H.O.: Is reliable.

Att.: is reliable.

H.O.: Uh-huh. I do.

Att.: And you claim that that is a neutral impartial presumption of a hearsay rule of evidence?

H.O.: No. I don't claim anything. But I do refer you to decisions made by Hearing Officers in courts throughout the State that are based on that same presumption of reliability.

Att.: Name me one that's done (inaudible)

H.O.: You are aware of Mr. Sam's decision in the matter.

Att.: Only because you keep telling me it exists but